

Second Supplement to Memorandum 86-89

Subject: Study L-1037 - Estate and Trust Code (Estate Management --
Comments)

Two reports are attached to this Supplement as exhibits:

Exhibit 1: Report of State Bar Study Team #1, dated September 26, 1986, concerning proposed Section 9613 in the First Supplement to Memorandum 86-89 (compelling personal representative to act).

Exhibit 2: Report of Probate, Trust and Estate Planning Subcommittee for Legislation, San Diego County Bar Association, concerning Sections 9700-9705 (deposit of money and personal property with financial institutions).

These two reports are discussed below:

ORDER COMPELLING PERSONAL REPRESENTATIVE TO ACT OR NOT TO ACT

Attached to the First Supplement to Memo 86-89 is a staff draft of a new section with a procedure to compel a personal representative to act or refrain from acting. Exhibit 1 approves the draft section in principle, but suggests some revisions. The staff thinks the suggestions are good ones, and recommends that the section be revised to read:

9613. (a) On petition of any interested person, and upon a showing that if the petition is not granted the estate will suffer irreparable ~~harm~~ injury, the court may order that the personal representative exercise or refrain from exercising any power given by this part, or perform or refrain from performing any duty imposed by this part. The order may include such terms and conditions as the court determines to be appropriate under the circumstances.

(b) Notice of the hearing on the petition shall be given for the period and in the manner provided in Section [1200.5].

Comment. Section 9613 is new and permits the court to direct the personal representative to act or not to act concerning the estate. The showing of irreparable injury under Section 9613 is analogous to the irreparable injury which must be shown for injunctive relief. Cf. Code Civ. Proc. § 526(2); 6 B. Witkin, California Procedure Provisional Remedies § 254, at 221 (3d ed. 1985).

DEPOSIT OF MONEY AND PERSONAL PROPERTY
WITH FINANCIAL INSTITUTIONS

Exhibit 2 suggests revisions to Sections 9700-9705 in the estate management draft attached to the basic memo (Memo 86-89). These are discussed below.

§ 9700. Savings accounts

The staff recommends that Section 9700 be revised to read:

§ 9700. Savings accounts

9700. (a) The personal representative may do any one of more of the following:

(1) Deposit money belonging to the estate in a bank in this state or in a trust company;

(2) May invest money belonging to the estate in an account in an insured savings and loan association in this state or in shares of an insured credit union in this state deposit money belonging to the estate in an insured account in a financial institution in this state.

(b) Unless otherwise provided by court order, the money deposited or invested under this section may be withdrawn without order of the court.

Comment. Subdivision (a) of Section 9700 provides authority for the deposit of estate money without court authorization. See Section 9610 (prior court authorization not required). If the deposit is withdrawable only upon court order, provisions for reducing the amount of the bond are found in Probate Code Section 541.1 and in Financial Code Section 1586. See also Section 9703 (deposits withdrawable only upon court order).

Section 9700 replaces former Probate Code Section 585 which authorized deposits in banks in this state and in insured savings and loan associations. Section 9700 expands the deposits permitted under former Section 585 to include deposits in insured credit unions. See Section 46 ("[i]nsured account in a financial institution" means an insured account in a bank, an account in an insured savings and loan association, and shares of an insured credit union, to the extent the account is insured).

Subdivision (b) recognizes that the court may order that deposited funds may be withdrawn only with court authorization. See Section 9703. See also Fin. Code §§ 764 (deposit with bank or trust company), 6850-6852 (account of fiduciary under savings association law); Prob. Code §§ 541.1 (exclusion of deposited property in computing amount of bond).

The provision of former Section 585 discharging the personal representative from responsibility for deposited money until withdrawn is not continued. The extent of the personal representative's responsibility for deposited funds is determined under Section 9600 (duty to use ordinary care

and diligence). This is consistent with Section 2453 (guardianship-conservatorship law). See also the Comment to Section 2453.

The above revisions simplify the drafting by using the newly-defined term "insured account in a financial institution" in place of the previous references to a bank, savings and loan, and credit union. The new term will be defined in Section 46 as follows:

46. "Insured account in a financial institution" means an insured account in a bank, an account in an insured savings and loan association, and shares of an insured credit union, to the extent that the account is insured.

The language in Section 46, "to the extent that the account is insured," accomplishes the point in Exhibit 2 that deposits should be permitted only to the extent insured.

The staff has deleted from Section 9700 the reference to depositing money in a "trust company" as suggested in Exhibit 2. Exhibit 2 notes that the section does not apply to a trust company, since a trust company is not in and of itself a depository institution. See Fin. Code §§ 106, 107.

§ 9701. Deposit of personal property with trust company

As suggested by Exhibit 2, the staff recommends that Section 9701 be revised to read:

§ 9701. Deposit of personal property with trust company

9701. The personal representative may deposit personal property of the estate for custody and safekeeping with a trust company. Unless otherwise provided by court order, the personal property may be withdrawn without order of the court.

Comment. The first sentence of Section 9701 provides authority for the deposit without court authorization of personal property of the estate with a trust company (defined in Section 83). See Section 9610 (prior court authorization not required). See also Sections 541.1, 9703; Fin. Code § 1586 (property deposited with trust company under court order).

Section 9701 replaces former Section 586 which permitted personal assets to be deposited with a trust company, and the bond of the personal representative reduced, "as provided by Division 1 of the Financial Code." If personal property is deposited with a trust company and the deposit is withdrawable only upon court order, provisions for reducing the amount of the bond are found in Section 541.1 and in Financial Code Section 1586. See also Section 9703 (deposits withdrawable only upon court order).

The staff has not made two changes suggested in Exhibit 2:

(1) Exhibit 2 would provide that a trust company, in accepting property for custody and safekeeping, is acting "as agent for the personal representative." The staff is concerned that this may impose vicarious liability on the personal representative by statute where factually there may not be an agency relationship. The staff thinks the general fiduciary standard (ordinary care and diligence -- Section 9600) is a better standard of the personal representative's liability.

(2) Exhibit 2 would add the following to Section 9701:

The terms of such agency shall be set forth in a written agreement between the personal representative and the trust company which may provide for compensation to be paid to the trust company from the assets of the estate. Such agreement may not authorize the trust company to take any action other than those permitted to be taken by the personal representative.

It is not clear why a written agreement should be required when existing law does not have that requirement. The staff is also concerned about authorizing the personal representative to delegate powers to a trust company which holds the property solely for "custody and safekeeping." Would this permit the trust company, for example, to sell the property?

The staff solicits the views of probate practitioners and others on these two points.

§ 9702. Deposit of securities in securities depository

Exhibit 2 notes that this section applies only to trust companies, since individual personal representatives are not eligible for membership in a securities depository. Exhibit 2 suggests that this section be deleted, since the area is covered by Financial Code Section 775.

Financial Code Section 775 does appear to deal adequately with the problem. But, rather than deleting Section 9702, the staff prefers to keep Section 9702 and to make a cross-reference in the section to Section 775, since Section 775 is not entirely clear on the question: Section 775 applies to a trust company holding securities "in a fiduciary capacity." This "fiduciary capacity" appears to include a trust company acting as personal representative, but we can

eliminate any doubt by keeping Section 9702 and redrafting it to incorporate Section 775 as follows:

§ 9702. Deposit of securities in securities depository

9702. (a) As used in this section, "securities depository" means a securities depository, as defined in Section 30004 of the Financial Code, which is either licensed under Chapter 2 (commencing with Section 30200) of Division 14 of the Financial Code or is exempted from such licensing by Section 30003 or 30006 of the Financial Code.

(b) Securities (a) A trust company serving as personal representative may deposit securities that constitute all or part of the estate ~~may be deposited~~ in a securities depository as provided in Section 775 of the Financial Code.

(b) If the securities have been deposited with a trust company pursuant to Section 9701, the trust company may deposit the securities in a securities depository as provided in ~~subdivision (b)~~ Section 775 of the Financial Code.

(c) The securities depository may hold securities deposited with it in the manner authorized by Section 775 of the Financial Code.

Comment. Subdivisions (a) and (c) of Section 9702 continue former Section 590 without substantive change, except that it is made clear in subdivision (a) that the authority provided there is for a trust company serving as personal representative. This limitation is consistent with Section 775 of the Financial Code.

Subdivision (b) continues the substance of former Section 586.1.

The personal representative may deposit securities under this section without prior court authorization. See Section 9610.

§ 9703. Accounts and deposits withdrawable only upon court order

Exhibit 2 would improve and simplify the drafting of Section 9703, and it suggests a new provision that a financial institution accepting a deposit subject to an order that it may be withdrawn only with court authorization is not "on notice of the existence of such order unless it has actual notice thereof." The staff agrees that the doctrine of constructive notice should not apply to a financial institution in this instance; otherwise financial institutions might be reluctant to accept such deposits. The staff would therefore revise Section 9703 to read:

§ 9703. Accounts and deposits withdrawable only upon court order

9703. (a) Upon application of the personal representative, the court may, with or without notice, order that

(a) All of a portion of the money of the estate or other personal property be deposited in a bank in this state or in a trust company or be invested in an account in an insured savings and loan association in this state or in shares of an insured credit union in this state, pursuant to Section 9700 or 9701 subject to withdrawal only upon authorization of the court.

(b) All of a portion of the personal property of the estate be deposited with a trust company, subject to withdrawal only upon authorization of the court. No financial institution accepting a deposit pursuant to Section 9700 or 9701 shall be on notice of the existence of such an order unless it has actual notice of it.

Comment. Section 9703 is a new provision based on authority implied under Section 541.1 and former Sections 585 and 586, except that Section 9703 applies to insured credit unions which were not included under Section 541.1 or former Section 585. Section 9703 is comparable to a provision of the guardianship-conservatorship law (Section 2456). If the deposit is withdrawable only upon court order, provisions for reducing the amount of the bond are found in Section 541.1 and in Financial Code Section 1586.

Only the personal representative may make an application under Section 9703. An interested person (such as an heir, devisee, or creditor) may neither make the application under Section 9703 nor petition for instructions under Section 9611.

Does the Commission approve the new language in subdivision (b)?

§ 9705. Interest on deposits by trust company

Exhibit 2 suggests language to make clear that a trust company may deposit funds with itself in excess of the federally insured amount (currently \$100,000) if it pledges securities to secure the uninsured portion. Trust companies now have this authority under Section 1562 of the Financial Code, and it appears that the section is broad enough to apply to a trust company acting as personal representative. The staff has added a new subdivision (b) to Section 9705 to make clear that the Financial Code provision does apply to a trust company acting as personal representative:

§ 9705. Deposits by trust company with own savings department

9705. Where a trust company is a personal representative and in the exercise of reasonable judgment deposits money of the estate in an account in any department of the corporation or association of which it is a part ~~it~~ :

(a) It is chargeable with interest thereon at the rate of interest prevailing among banks of the locality on such deposits.

(b) Notwithstanding any other provision of this code, the trust company may make such a deposit in excess of the amount covered by insurance if it pledges securities as provided in Section 1562 of the Financial Code.

Comment. Subdivision (a) of Section 9705 restates former Probate Code Section 920.5 without substantive change. The reference in the introductory clause to an "association" is new and is intended to include a national banking association. See Fin. Code § 1502. Subdivision (b) is new and recognizes authority given by Section 1562 of the Financial Code.

The type of account into which moneys of the estate are to be deposited depends on the type of account which best serves the needs of the estate. The time within which the estate may be distributed, the time of the receipt of the funds, and the immediate need for funds in order to meet the requirements of administration are all factors in determining the type of account in which the funds should be deposited. For example, where there is a substantial sum in excess of immediate requirements and the sum is to be held over a period of time, the personal representative should deposit the funds in an account (which would include purchase of a certificate of deposit where appropriate under the circumstances) which not only would safeguard the funds but also allow a rate of interest on the funds that is advantageous to the estate. See In re Estate of Smith, 112 Cal. App. 680, 685-86, 297 P. 927 (1931). See also Estate of Buchman, 138 Cal. App. 2d 228, 238-39, 291 P.2d 547 (1955); Fin. Code § 6515 (association as personal representative); Prob. Code [§ 2543.5] (trust company as guardian or conservator), 9600 (duty of personal representative to manage estate using ordinary care and diligence), 16225 (trustee's power to deposit trust funds).

Does the Commission approve subdivision (b)?

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1
LAW OFFICES OF

DIEMER, SCHNEIDER, JEFFERS, LUCE & QUILLINAN

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September 29, 1986

Mr. John H. DeMouilly
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: Memo 86-89, First Supplement

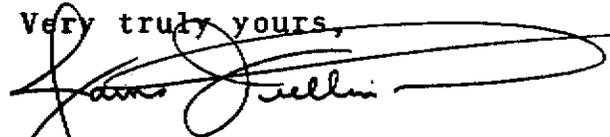
Dear John:

Please find enclosed a copy of Study Team No. 1's report on Memo 86-89, First Supplement.

This report represents the opinion of the team only. The report has not been reviewed by the executive committee. I am sending it to you for your information and comment.

See you in October.

Very truly yours,



James V. Quillinan
Attorney at Law

JVQ/h1
Encls.

cc: Chuck Collier Jim Opel
 Keith Bilter Jim Devine
 Irv Goldring Lloyd Homer

R E P O R T

TO: JAMES V. QUILLINAN
LLOYD W. HOMER
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THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, TEAM CAPTAIN
STUDY TEAM NO.1

DATE: SEPTEMBER 26, 1986

SUBJECT: REPORT OF STUDY TEAM NO. 1 on First Supplement to LRC
Memo 86-89; Study L-1037 - Estate and Trust Code
(Compelling Personal Representative to Act) New Estate
and Trust Code § 9613

Conference Call: A conference call was held on Friday, September 26, 1986. W.S. "Gus" McClanahan did not participate, but the other five members, Charles A. Collier, Jr., Robert A. Schlesinger, Richard S. Kinyon, Sterling ("Terry") L. Ross, Jr. and William V. Schmidt participated.

Generally, Study Team No. 1 agreed that proposed Section 9613 is a good one and should be added to the Estate and Trust Code. Under the present code, the only remedy of an unhappy beneficiary may be a petition for removal of the personal representative. We have commented in the past that we feel that this remedy may be too harsh under the particular circumstances and an intermediate remedy not as harsh as removal should be made available to the beneficiary.

We are concerned that the Section may be abused, but we feel

that the requirement of the showing of irreparable harm to the estate is a good one, and hopefully will prevent abusive use of the Section.

We feel that the Section could be improved by adding the words "upon such terms and conditions as the court deems appropriate under the circumstances" to the end of subsection (a) or by otherwise incorporating these words or this concept elsewhere into subsection (a). Such words give the court greater flexibility. For example, the court may wish to order the personal representative to act or to refrain from acting only upon the occurrence of a certain condition or conditions. The court may also wish to limit the extent or the duration of the action or inaction it orders.

Our study team wonders if the words "irreparable harm" as used in the Section were intended to be used in the same sense as they are used for injunctive relief. We note that Civil Code of Procedure Section 526(2) uses the words "irreparable injury." Is the standard of "irreparable harm" as used in the proposed Section to be the same as the standard of "irreparable injury" required for injunctive relief? We feel that it should be. If the commission and staff agree, we would recommend consideration of a cross-reference to Civil Code of Procedure Section 526(2) or some other appropriate comment to assist the court and attorneys in this connection. Perhaps the words "irreparable harm" in the proposed Section should be changed to "irreparable injury."

Our study team also raised the question of whether this procedure was available to beneficiaries of trusts. We felt that existing Probate Code Section 1138.1(4) permitting a beneficiary to petition the court for an order instructing the trustee, was perhaps even broader than proposed Section 9613 since Probate Code Section 1138.1(4) does not require the showing of irreparable harm. We suggest that consideration be given in the trust

provisions of the new Estate and Trust Code for a parallel provision to proposed code Section 9613.

Respectfully submitted,

STUDY TEAM NO. 1

By:



WILLIAM V. SCHMIDT,
Captain

EXHIBIT 2

**CALIFORNIA
FIRST BANK**



TRUST DEPARTMENT, FIFTH AVENUE AT B STREET
P. O. BOX 109, SAN DIEGO, CALIFORNIA 92112-4103
(619) 230-4507

September 17, 1986

California Law Revision Commission
4000 Middlefield Road, Rm. D-2
Palo Alto, CA 94306

Attention: Mr. John de Mouilly

Re: Memorandum 86-55, Study L-1037,
Estate and Trust Code

Dear Commissioners:

I have been asked by the Probate, Trust and Estate Planning Subcommittee for Legislation of the San Diego County Bar Association to present the subcommittee's comments on proposed Sections 9700 through 9705 of the new code. The attached sheets represent the suggestions of the subcommittee, together with comments providing reasons for its changes. Your kind attention to this input is appreciated.

Sincerely,

G. Sinclair Price
Vice President &
Trust Counsel

GSP:pjb
Enclosure
cc: Members of the Subcommittee

9700. The personal representative may place ~~[deposit]~~ money belonging to the estate in deposit account(s) in this state in a bank, [in this state or in a trust company or may invest such money] in an account in an insured savings and loan association or in shares of a ~~[in insured]~~ credit union. Such deposits shall be permitted only to the extent that they are insured by an agency of the federal government or, in the case of deposits made by a trust company in its commercial department, collateralized as provided by law. Unless otherwise provided by court order, the money may be withdrawn without order of the court.

Comment: The term "deposit" has material significance when used in this context. While the succeeding sections deal with the placement of various types of property for safekeeping purposes, this section appears to relate to the kind of deposit which creates a debtor-creditor relationship between the depositor and the institution. As such, it is inappropriate to include "trust company" since the latter is not, in and of itself, a depository institution.

The words "in this state" were moved in order to make them applicable to S & L's and credit unions as well as banks. The subcommittee felt that this would be preferable to deletion of the requirement.

It is also the opinion of the subcommittee that deposits should be limited to the federally insured limits except to the extent that they are collateralized pursuant to the requirements of Financial Code section 1562.

9701. The personal representative may deposit personal property of the estate for custody and safekeeping with a trust company as agent for the personal representative. Unless otherwise provided by court order, the personal property may be withdrawn without order of the court. The terms of such agency shall be set forth in a written agreement between the personal representative and the trust company which may provide for compensation to be paid to the trust company from the assets of the estate. Such agreement may not authorize the trust company to take any action other than those permitted to be taken by the personal representative.

Comment: The changes in the first sentence are suggested to distinguish the deposits referred to in this section from those in section 9700. The additional sentences are suggested to add definition to the arrangement contemplated by the section.

9702. Comment: This section is of concern only to trust companies, since individual personal representatives are not eligible for membership in a securities depository. It is suggested that this section be deleted, since the area

is adequately covered in Financial Code section 775.

9703. Upon application of the personal representative, the court may, with or without notice, order that money or other personal property be deposited pursuant to section 9700 or 9701 subject to withdrawal only upon authorization of the court. No financial institution accepting a deposit pursuant to sections 9700 or 9701 shall be on notice of the existence of such order unless it has actual knowledge thereof. (balance of section to be deleted)

Comment: The suggested change ties in to the preceding sections without requiring repetition of the elements of the arrangements. It also provides protection to a financial institution accepting the deposit without knowledge of the withdrawal restriction.

9705. Comment: The personal representative has a duty to keep the assets of the estate reasonably productive whether on deposit with itself or any other institution. It must therefore consider rates, safety and access restrictions available in the community. The existence of this section which zeroes in on one specific aspect of this duty gives rise to questions as to possible additional requirements pertaining to own-bank deposits. Either these should be spelled out or the section should be deleted.